Filed 2/28/12 Drapinski v. Napa County CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RON DRAPINSKI, JR., as Trustee, etc., Plaintiff and Appellant, v. NAPA COUNTY, Defendant and Respondent.	A130521 (Napa County Super. Ct. No. 26-52573)

Plaintiff Ron Drapinski, Jr. sued defendant County of Napa for failure to discharge a mandatory duty (Gov. Code, § 815.6).[1] After allowing plaintiff one opportunity to amend his complaint, the trial court sustained a demurrer to the first amended complaint on the ground that the duties on which plaintiff based his suit were discretionary, and Napa County was therefore immune. (§ 818.2.) Plaintiff contends his first amended complaint successfully pleads a failure to discharge a mandatory duty. We disagree and affirm.

I. FACTS

In reviewing the sufficiency of a complaint, we provisionally accept as true all properly pleaded allegations of material facts stated in the complaint. (See *Pacific Gas & Electric Co.* v. *Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1125; *Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318.)

Plaintiff alleges through a family trust, he owns 4299 East Third Avenue in Napa County, California. The Drapinski property is located immediately adjacent to 4297 East

[1] Statutory references are to the Government Code.

Third Avenue, Napa, California, which is owned by Robert and Anne Arns. The two properties share a common boundary.

On or around January 2006, and continuing through the time of the filing of the first amended complaint, the Arns and/or their agents have constructed improvements to the Arns property, including a single family residence and vineyard. The improvements included a "tank farm" consisting of eight 5,300-gallon Rotonics water tanks which have been installed more than 70 feet from the street and immediately adjacent to, or partially on, the property line separating the Arns property from the Drapinksi property. These tanks are unscreened and directly visible from the Drapinksi property.

The Arns and/or their agents have also constructed a cement retaining wall along, or partially over, the property line to retain soil from the Drapinski property to allow the "tank farm" to be installed immediately adjacent to, and/or on, the Arns/Drapinski property line. The retaining wall is about 130 feet long and exceeds four feet in height. The Arns and/or their agents have also constructed a cement wall along, or partially over, the property line that is solid cement from top to bottom and is over eight feet tall.

Starting in the summer of 2007, plaintiff has repeatedly put defendant Napa County on notice that the "tank farm," retaining wall, and solid cement wall did not have proper permits and violate Napa County zoning ordinances, the California Building Code, and the County's building permit requirements. Specifically, although we do not need to discuss the matter in detail, the "tank farm" allegedly violated Napa County Code of Ordinances Nos. 18.104.010 and 18.104.140(A), because they are too close to the property line.[2] Also, the tank farm and walls allegedly violate several provisions of the California Building Code.

II. PLAINTIFF'S CONTENTIONS AND TRIAL COURT RULING

Plaintiff bases his lawsuit on the concept of mandatory duty. He alleges that several Napa County ordinances involving the Development and Planning Department created a mandatory duty to enforce zoning laws. Specifically, plaintiff contends that

[2] Hereafter, references to "No." or "Nos." refer to the Napa County Code of Ordinances.

such a mandatory duty was created by Nos. 2.50.010, 2.50.034, and 18.144.030—especially No. 2.50.034, which charged the director of the Development and Planning Department to enforce the zoning ordinances.[3]

Napa County demurred to the first amended complaint. After considerable briefing and oral argument, the trial court sustained the demurrer without leave to amend and entered judgment for Napa County. The trial court ruled as follows: "Plaintiff contends that an adjacent property owner has improperly erected water towers and walls on his property without obtaining permits as required by local ordinance. He is suing Napa County for failure to discharge its mandatory duty to enforce its ordinances against the property owner, as well as for injunctive and declaratory relief on account of the failure to enforce.

"The previous demurrer was sustained, with leave to amend, on the ground plaintiff had not adequately alleged a duty that the County was mandated, but failed, to discharge. In response, plaintiff amended his complaint by alleging the County had a mandatory duty under Napa County Code section 2.50.034 to enforce its zoning ordinances. However, as section 2.50.034 provides no specific prescription of how the zoning ordinances are to be enforced, thus the duty is considered discretionary for purposes of determining governmental liability. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498 ['[i]t is not enough . . . that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion'] [(*Haggis*)]; see also *Nunn v. State of California* (1984) 35 Cal.3d 616, 624 [no mandatory duty where duty is simply an obligation to perform a discretionary function] [(*Nunn*)].)

[3] No. 2.50.034 provides, in part, that "The director shall have charge of the enforcement of the zoning ordinances of the county." No. 18.144.030 provides that "[i]t shall be the duty" of the director, his deputy and other county officials charged by law with enforcement of zoning provisions to enforce those provisions.

"Because plaintiff has been unable to allege a mandatory duty on the part of the County and one which Napa County failed to discharge, the demurrer is properly sustained, without leave to amend."

The court then entered judgment in favor of Napa County.

III. DISCUSSION

Under our statutory scheme of government tort liability, a public entity may be liable for failing to discharge a mandatory duty imposed by an enactment (§ 815.6), but is not liable for "failing to enforce any law." (§ 818.2; see § 821 [similar immunity for public employees].) "The immunity afforded by . . . sections 818.2 and 821 attaches only to discretionary functions. [Citations.]" (*Nunn, supra,* 35 Cal.3d at p. 622.)

Whether a particular enactment is intended to impose a mandatory duty is a question for the courts. (*Haggis, supra,* 22 Cal.4th at p. 499; *Nunn, supra,* 35 Cal.3d at p. 624.) As the trial court correctly noted, there is no mandatory duty within the meaning of section 815.6 if the duty imposed by the enactment is "a mere obligation to perform a discretionary function . . . ." (*Nunn, supra,* 35 Cal.3d at p. 624; see *Haggis, supra,* 22 Cal.4th at p. 498.)[4]

Generally, the enforcement of laws involves an element of discretion. A general requirement that a particular official "shall" enforce the law, absent more, does not ipso facto remove that discretionary element and invoke section 815.6. (*Burns v. City Council* (1973) 31 Cal.App.3d 999 (*Burns*).)

For instance, in *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960 (*Wood*), the county was held immune from liability for a death resulting from a motorboat accident because it failed to enforce speed limits or safety ordinances. (*Wood, supra,* at pp. 974−975.) The court quoted the California Law Revision Commission's recommendation for the enactment of section 818.2: " '[P]ublic entities and their

[4] *Haggis* drew an important distinction between ordinances with "shall" language that still embody a discretionary function and purpose, and ordinances that do not leave room for any discretionary decisionmaking, such as the mandatory recording of a certificate of substandard condition once recording conditions have been determined.

employees should not be liable for inadequate enforcement of any law or regulation or for failure to take steps to regulate the conduct of others. The extent and quality of governmental service to be furnished is a basic governmental policy decision . . . .

'[D]iscretionary decisions in these areas cannot be subject to review in tort suits for damages if government is to govern effectively.' " (*Wood, supra,* 111 Cal.App.4th at p. 975.; 4 Cal. Law Revision Com. Rep. (1963) 801, 817−818.)

In *Morris v. County of Marin* (1977) 18 Cal.3d 901, the Supreme Court said "we do not hold that every statute which uses the word 'shall' is obligatory rather than permissive." (*Id.* at p. 910, fn. 6.) In that same footnote, the court drew an analogy to the law enforcement context: "there are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion." (*Id.* at p. 911, fn. 6.) The court immediately cited section 26501, which provided that a district attorney "shall" institute proceedings for arrests of persons reasonably suspected of criminal proceedings when he had information that such offenses occurred. The court then cited with approval *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757 (*Locke*), which construed that statute. *Locke* concluded that, in general, "the matters of investigation and prosecution [are] matters in which the district attorney is vested with discretionary power as to which mandamus will not lie"—i.e., there is no mandatory duty. (*Locke, supra,* at p. 757.)

In this same vein, *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 811, footnote 3, also quotes the California Law Revision Commission Comment to section 818.2: " 'This section would be unnecessary except for a possible implication that might arise from Section 815.6, which imposes liability upon public entities for failure to exercise reasonable diligence to comply with a mandatory duty imposed by an enactment. This section recognizes that . . . the discretion of law enforcement officers in carrying out their duties, should not be subject to review in tort suits for damages if political responsibility for these decisions is to be retained.' "

Plaintiff argues essentially from negative implication: he urges that because the California Building Code states that some types of construction do not require a permit, all others do. This argument evades the discussion of the law we have set forth above.[5]

Haggis, supra, 22 Cal.4th at page 500, explains that we should "examine the language, function, and apparent purpose" of ordinances, such as No. 18.144.030 and the applicable California Building Code, in context. In so doing, we conclude under the alleged facts Napa County still retains discretion in the enforcement of its zoning laws and pertinent provisions of the California Building Code. That discretion is protected by the immunity of sections 818.2 and 821.[6]

IV. DISPOSITION

The judgment for the County of Napa is affirmed.

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Banke, J.

[5] Cf. *Burns, supra,* 31 Cal.App.3d 999, holding that the decision to issue a building permit is discretionary.

[6] Plaintiff also argues the variance procedure shows that nonvariant construction must be subject to mandatory enforcement. The possibility of obtaining a variance does not impact the separate issue of discretionary enforcement in general.